Mid-State Ready Mix, a Division of Torrington Industries, Inc. *and* Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL–CIO.[1] Case 3–CA–14517

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 22, 1989, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

For the reasons stated below, we reject the Respondent's exceptions to the judge's findings that the Respondent violated Section 8(a)(5) by the following conduct: (1) laying off unit employees and replacing them with a nonunit employee, without first giving the Union notice and an opportunity to bargain; and (2) refusing to continue contract negotiations unless the Union agreed to the Respondent's proposal that the Union's job steward be jointly selected by the Union and the Respondent.

1. The Respondent is engaged in the production and sale of ready-mix concrete at its Oneida, New York facility. The Oneida facility, which the Respondent acquired in January 1988,[3] is one of nine such plants owned by the Respondent in the northeastern New York and Connecticut area. Following an election on July 8, the Union was certified on July 18, 1988, as the exclusive bargaining representative of drivers, mechanics, and yardmen at the Oneida facility.

The Respondent employed two full-time drivers, William Marshall and Alton Blair, to haul sand, stone, and cement powder to the Oneida facility. Marshall was assigned to drive a 10-wheel dump truck hauling primarily sand, but some stone. Blair drove a tractor-trailer truck, also hauling stone, sand, and, until May of that year, cement powder.[4]

On July 11, the Respondent laid off Marshall and transferred the 10-wheel dump truck he had been driving to one of the Respondent's other facilities.[5] For nearly 2 weeks after Marshall's layoff, Blair worked an extra 10 to 15 hours per week to maintain the stockpiles. Thereafter, the Respondent transferred a nonunit employee, Benny Haywood, and the tractor-trailer truck driven by Haywood, from one of the Respondent's other plants to haul sand while Blair continued hauling stone.[6]

On July 27, the Respondent informed Blair that it was transferring his truck to another facility and that he could either take a layoff or drive a ready-mix truck.[7] The Respondent's president, Theodore Zoli, testified that it transferred Blair's truck to another of the Respondent's plants[8] and that the task of hauling sand, stone, and cement powder was reassigned to Haywood, supplemented, as needed, by supplier deliveries of cement powder and independent contractors hauling sand and stone. There is no dispute that the Respondent did not inform the Union of the layoff of either Marshall or Blair ahead of time, or of its plans to replace them.

The judge found that the Respondent violated Section 8(a)(5) and (1) by laying off Marshall and Blair and replacing them with a nonunit employee and independent contractors, because it did not give notice to the Union of the decisions that led to these actions or an opportunity for the Union to bargain about the decisions and their effects on the unit employees.[9] Noting that the Respondent regularly transferred vehicles and drivers and used outside firms to supply its raw materials, the judge found that the Respondent's decisions at issue did not constitute a significant change in the nature or direction of the business and were thus amenable, as mandatory subjects of bargaining, to the collective-bargaining process.

In finding the alleged violations, the judge relied on *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court held that

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are 1988 unless otherwise indicated.

[4] In May the cement blower used to remove cement powder from the truck to watertight silos broke down and was not replaced. Thereafter, suppliers provided cement powder to the Respondent's facility.

[5] The Respondent's president, Theodore Zoli, testified that the dump truck was needed at another facility to meet peak-season demand.

[6] The record discloses that the Respondent paid Haywood's living expenses, including motel accommodations and meals, and travel expenses for the 5-hour commute to his home on the weekends.

[7] The judge found that, despite this ostensible offer, Blair was discouraged from driving a ready-mix truck and that none was made available to him.

[8] According to Zoli, Blair's truck had a state permit to carry a 15-ton load although the truck's capacity was far greater, and the Respondent was in the process of applying to the State for an overload permit to carry the truck's capacity. In the meantime, however, because of the limited capacity, Blair was unable to keep up with the increased demand occasioned by Marshall's layoff and peak season.

[9] The Respondent has not excepted to the judge's finding that it violated Sec. 8(a)(5) and (1) by failing to bargain over the effects of its decisions.

> the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of bargaining under Sec. § 8(d).

379 U.S. at 215. In doing so, he also found that because the Respondent's decisions did not turn on a change in the scope, nature, or direction of the business and were amenable to collective bargaining, his conclusion that bargaining was mandated was not inconsistent with either *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), or *Otis Elevator Co.*, 269 NLRB 891 (1984).

The Respondent excepts to the judge's decision on the ground that its decisions to lay off Marshall and Blair were entrepreneurial and did not turn on labor costs and, thus, are outside the scope of Section 8(d). We find no merit in the Respondent's exception.

In *Dubuque Packing Co.*, 303 NLRB 386 (1991), we recently had occasion to reconsider the tests set forth in *Otis Elevator Co.*, supra, for determining whether particular managerial decisions affecting employees are mandatory subjects of bargaining. With respect to the kind of decision at issue in *Dubuque*—a decision to relocate bargaining unit work—we abandoned the three distinct tests embraced by the plurality opinion and two individual Board members in *Otis Elevator*, in favor of a burden-shifting test with alternative grounds for the employer's defense after the General Counsel has made out a prima facie case. We made clear, however, that that particular burden-shifting test was devised for determining the nature of relocation decisions, and we did not purport to extend it to other types of management decisions that affect employees. Id. at 390 fn. 8.

Although that burden-shifting test was therefore not made applicable to the kind of decision at issue in this case, our review of Supreme Court precedent, and in particular our acknowledgement that the Court's decision in *First National Maintenance* had not repudiated the principles of *Fibreboard*, is of relevance here. Id. at 388–390.

We concluded in *Dubuque* (at 389–390) that the *Fibreboard* Court had implicitly engaged in a balancing of factors before reaching the conclusion that an employer had a duty to bargain over the kind of subcontracting decision at issue there. As Justice Stewart explained the holding in his concurring opinion, 397 U.S. at 224, ''all that is involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer.'' *Fibreboard*, supra, 379 U.S. at 218. Such decisions, as the Court in *First National Maintenance* agreed, do not involve ''a change in the scope and direction of the enterprise'' and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation defined in the Act. 452 U.S. at 677, citing *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring). Thus, when the record shows that essentially that kind of subcontracting is involved, there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is. See also *First National Maintenance*, supra, 452 U.S. at 687–688 (emphasizing that the decision at issue there involved discharging employees without replacing them).

We believe, for the reasons stated below, that, with the possible exception of one factor, we are presented with what may be termed ''*Fibreboard* subcontracting'' here. The Respondent, points out, however, that in *Fibreboard* the Supreme Court had referred to labor costs as a factor in the subcontracting decision at issue there. The Respondent argues that labor costs were not a factor in its decision here and contends that, for that reason, *Fibreboard* is inapplicable. We agree that there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. We do not reach that issue here, however, because the Respondent's reasons had nothing to do with a change in the ''scope and direction'' of its business. Those reasons, thus, were not matters of core entrepreneurial concern and outside the scope of bargaining. *First National Maintenance*, supra at 677.

First, it is clear that employees Blair and Marshall were simply replaced and that their discharge was thus not the result of an elimination of the type of work they performed. The Respondent continued to prepare ready-mix concrete at the Oneida facility with the same raw materials as it had prior to the layoffs. It did not, for example, close down its Oneida operation. Cf. *First National Maintenance Corp. v. NLRB*, supra. Rather, it simply replaced the two employees hauling sand and stone with a nonunit employee and independent contractors, also hauling sand and stone.

Second, the Respondent has not shown that the reasons it gave for the layoffs and subsequent reallocation of the work to others involve entrepreneurial decisions that are outside the range of bargaining or decisions dictated by emergencies that render bargaining impractical. The Respondent argues that its decisions to lay off Marshall and Blair were ''caused by the seasonal nature of [its] business and a mechanical breakdown.'' We are not persuaded by this argument. Although the seasonal nature of the Respondent's business may explain its decision to transfer Marshall's truck to another of its facilities, the decision at issue is not the transfer of the trucks, but the replacement of employees. An increase in workload does not logically require a decrease in the number of workers to perform the work. The seasonal nature of the business may require

that outside contractors be employed to haul additional stockpiles beyond that hauling which its own employees can perform, but this possibility does not entitle the Respondent to lay off unit employees and replace them with nonunit employees or independent contractors without bargaining with the collective-bargaining representative.[10] Nor does the fact that the Respondent's cement blower broke down in May provide a reason for the Respondent's layoff of Blair in late July.[11] Blair continued to haul sand and stone until his layoff, working overtime during the period after Marshall's layoff. We therefore agree with the judge that the breakdown of the cement blower was not a factor in Blair's layoff.

Similarly, the reason given to Blair and advanced by the Respondent's president Zoli at the hearing—that Blair's tractor did not not have a state permit to carry capacity—may explain the reason it transferred the truck, but it does not explain Blair's layoff. The Respondent offered no explanation why it transferred the truck *and the driver* to the Oneida facility rather than let Blair drive the new truck, a result which ultimately occurred when the Respondent recalled Marshall in November. Nor does it explain why the Respondent would not put Blair on the ready-mix truck he requested.[12] Finally, the Respondent's claim that Marshall's layoff was necessary because his arthritic condition prevents him from operating many vehicles has nothing to do with core entreprenurial considerations. In any event, it was refuted by Marshall at the hearing and by the fact that he had operated both a dump truck and a ready-mix truck during the 2 years he had been employed at the Oneida facility.

In examining the Respondent's proffered reasons, we do not suggest that the Respondent was acting for unlawful motives or that it was not free to layoff these two employees. We simply find that the Respondent has not shown that its decision to replace them through subcontracting was dictated by any core entrepreneurial reasons. No substantial commitment of capital or change in the scope of the business would be involved in negotiating with the Union over, for example, transferring the truck, but not the driver, or making a ready-mix truck available to Marshall and Blair. Thus, whether or not the Respondent's decision to replace them with nonunit personnel was motivated by labor costs in the strictest sense of that term, the fact remains that the decision clearly involved unit employees' terms of employment and it did not ''lie at the core of entrepreneurial control.'' *Fibreboard*, supra, 379 U.S. at 223 (Stewart, J., concurring).

Contrary to our concurring colleague, we are not fashioning a per se rule that *any* subcontracting decision that does not involve a significant change in scope and direction of the enterprise is a mandatory subject of bargaining. As noted above, we are dealing with only those cases, factually similar to *Fibreboard*, in which virtually all that is changed through the subcontracting is the identity of the employees doing the work.[13] In such cases we see no need to reinvent the wheel by rebalancing the factors weighing for and against a finding that the decision is subject to the bargaining obligation. Of course, in determining that the Respondent's reasons for subcontracting were not entrepreneurial decisions affecting change in scope and direction of the enterprise, we have considered a factor which our colleague appears to be addressing under his separate amenability-to-bargaining test. We have noted that, even assuming that choice of equipment for the work was for the Respondent to determine, the question of whether Blair and Marshall were capable of efficiently operating the new trucks was a reasonable topic for bargaining about with the Union that represented the two employees.[14] Accordingly, although we may not have considered the facts under the same labels as our colleague, we believe that in determining that this is essentially *Fibreboard* subcontracting and therefore a mandatory subject of bargaining, we have kept faith with *Fibreboard* as reaffirmed in *First National Maintenance.*

Accordingly, we find that the Respondent had a duty to provide notice to and bargain on request with the Union concerning its decisions to lay off Marshall and Blair and replace them with nonbargaining unit employees and independent contractors. Because the Respondent failed to provide the Union with that notice,

[10] In this case, the ''need'' for the additional help may have arisen as much from the Respondent's layoff of Marshall as from the increased seasonal demand.

[11] Respondent's president Zoli testified that the cement blower broke down sometime in May and that, thereafter, the cement powder was delivered to the facility.

[12] The ready-mix truck Blair requested was being operated on a part-time basis by a trainee.

[13] Our concurring colleague argues that this case is factually distinguishable from *Fibreboard* because ''[v]ehicles were transferred; employees of the Respondent were transferred; employees of the Respondent were given new job assignments.'' We disagree. The fact that the Respondent made certain tangential decisions—like transferring trucks—is immaterial because those decisions are not at issue in this case and, as we have noted above, would not necessarily be affected by bargaining over the question whether the two drivers could still perform the work. That the Respondent replaced Marshall and Blair with a combination of outside subcontractors and its own transferred and reassigned *nonunit* employees, is also a distinction without a difference. The fact remains that in this case, as in *Fibreboard*, the Respondent replaced unit employees with nonunit employees to do the same job.

[14] This could be considered a ''labor cost'' matter in a broad sense of the term, and to that extent we have made a finding that labor costs are involved. We do not, however, see the usefulness of the *Dubuque* ''labor cost concession'' test in cases involving decisions that, unlike the plant relocation decision at issue in *Dubuque*, are not likely to be entwined with changes in the operation of the enterprise that go well beyond merely the replacement of one set of employees doing work by another set of employees.

we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1). We shall modify the Order to conform to our findings.

2. The Respondent makes essentially three arguments in its attack on the judge's finding that it violated Section 8(a)(5) and (1) of the Act by refusing to meet and negotiate unless the Union agreed to joint employer-union selection of the Union's job steward. We find no merit to any of them.

First, we disagree with the Respondent's contention that the judge erred in declining to dismiss this allegation on the basis of *Good GMC, Inc*., 267 NLRB 583 (1983), and *Nordstrom, Inc*., 229 NLRB 601 (1977). We agree with the judge that those cases are inapposite. There the Board found that the employers had not violated Section 8(a)(5) by refusing to execute contracts where the unions agreed only to the mandatory subjects of the employers' offers. The Board reasoned that the employers' offers on those subjects would be different depending on changes in the resolution of the nonmandatory subject. Standing alone, the packages of mandatory subjects did not represent the employers' agreements. By contrast, the Respondent here refused to bargain at all so long as the Union refused to agree to the Respondent's position on a nonmandatory subject.

Second, the Respondent contends that its position was justified because the Union's steward proposal had cost aspects (use of worktime to process grievances) and was therefore a mandatory subject. This argument lacks merit because the Respondent did not, in declining to bargain, single out the cost aspect as the source of its objection. It was plainly insisting on intruding into the Union's choice of grievance representative. As explained in *Missouri Portland Cement Co*., 284 NLRB 432, 434 fn. 13 (1987), the fact that proposals on union grievance representatives may have mandatory aspects does not make the *identity* of the representative a matter on which the employer has any right to insist.

Finally, the Respondent reiterates the contention it made to the judge that the complaint allegation relating to the steward proposal should have been dismissed on the ground that the Respondent withdrew its steward-selection proposal on October 18 without qualification. We find no merit to this. The violation occurred upon the Respondent's unlawful act of conditioning further bargaining on the Union's agreement to the Respondent's proposal. It is immaterial that the Respondent withdrew its proposal nearly 2-1/2 months after it was proposed and after the Union had filed the unfair labor practice charge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mid-State Ready Mix, A Division of Torrington Industries, Inc., Oneida, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Cancel, withdraw, and rescind the layoff of unit employees and the transfer of the work of hauling cement, sand, and stone previously performed by employees employed at its Oneida, New York facility who are represented by the Union to other employees who are not so represented and notify and on request bargain with the Union with respect to the subcontracting out of any such work.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, concurring.

I concur in my colleagues' finding that the Respondent violated Section 8(a)(5) by failing to bargain about its decisions to lay off two unit employees and to assign their work to a nonunit employee and independent contractors.[1] I disagree, however, with their failure to apply the test of *Dubuque Packing Co*., 303 NLRB 386 (1991), to resolve the issue of whether the decisions in dispute involved a mandatory subject of bargaining. The majority has erroneously imposed an inflexible rule on a broad variety of employer subcontracting decisions that do not involve a change in the scope or direction of the employer's enterprise. The majority says that the decision to engage in such subcontracting is a mandatory bargaining subject, even if labor costs do not influence the decision and even if labor cost concessions could not change the decision. I disagree. To apply such a flat rule would require bargaining even where the decision is not amenable to the collective-bargaining process. This is directly contrary to Supreme Court precedent.

In *First National Maintenance Corp. v. NLRB (FNM)*, 452 U.S. 666 (1981), the Court said that bargaining over a certain category of management decisions[2] would be required only if the potential benefits of bargaining would outweigh the burdens that bargaining would place on the business. The Court said that this balancing test was implicitly applied in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1984), to find that the subcontracting there was a mandatory subject of bargaining. That is, in *Fibreboard*, the subcontracting was motivated by labor cost considerations and hence the subcontracting was particularly ame-

[1] I join my colleagues in affirming the judge's finding that the Respondent also violated Sec. 8(a)(5) by refusing to meet and negotiate with the Union unless the Union agreed to joint employer-union selection of the Union's job steward.

[2] These decisions have a direct impact on employment but have as their focus the economic profitability of the employing enterprise. *FNM*, supra, 452 U.S. at 677.

nable to the bargaining process. As to the other side of the balance, the subcontracting there did not involve a change in the scope or direction of the business, and thus a bargaining requirement would not burden the employer's enterpreneurial freedom to run the enterprise.

Contrary to *FNM* and *Fibreboard*, the majority here turns a two-factor test into a one-factor test. These two Supreme Court decisions stressed extent of entrepreneurial change *and* amenability to bargaining. The majority here says that if the entrepreneurial change is slight, that is the end of the matter. That is, if the subcontracting decision does not involve a significant entrepreneurial change, it is per se a mandatory subject of bargaining. Clearly, however, the Supreme Court requires another step in the inquiry, viz., whether the decision is amenable to bargaining. If the decision is not amenable to the bargaining process, the potential advantages to bargaining would not outweigh the burdens that bargaining would place on the enterprise, even if those burdens are slight. Phrased differently, there is no point in requiring bargaining where such bargaining can have no meaningful result other than to delay the effectuation of the employer's decision.

The difficulties presented by the majority's approach can be avoided by the application of the Board's rule in *Dubuque*. In that case, the Board announced the following test for determining whether an employer's economically motivated decision to relocate unit work is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.[3]

Thus, the *Dubuque* approach takes into consideration entrepreneurial prerogatives *and* amenability to bargaining. Further, the *Dubuque* approach is not a test that is new and different from *FNM* and *Fibreboard*. Rather, it is based squarely on these cases. It is a burden-of-proof mechanism for applying the balancing test of *FNM*. In addition, the application of *Dubuque* eliminates the confusion of having a different test for subcontracting decisions. Finally, the Supreme Court said in *FNM* that the balancing test set forth therein was implicitly used in *Fibreboard*, a subcontracting case. Because the *Dubuque* approach is a mechanism for applying that balancing test, it is clear that the *Dubuque* approach should be used in subcontracting cases.[4]

My colleagues argue that the instant case is essentially a *Fibreboard* case and thus there is no need to ''reinvent the wheel'' by applying the *Dubuque* test. They use the term ''*Fibreboard*'' to refer to those cases ''in which virtually all that is changed through the subcontracting is the identity of the employees doing the work.'' The instant case shows the danger of using a label to decide a case. This case involves more than ''*Fibreboard*'' as defined by my colleagues. Vehicles were transferred; employees of the Respondent were transferred; and employees of the Respondent were given new job assignments.[5] None of this was true in *Fibreboard*. In these circumstances, I would not simply utter ''*Fibreboard*'' and let that decide the case. Rather, I would apply the test of *Dubuque*, a test which considers and weighs all relevant factors.[6]

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[3] 303 NLRB 386, at 391.

[4] In a case presenting facts identical to those in *Fibreboard*, application of the *Dubuque* test would lead to the identical conclusion that the employer's subcontracting decision was a mandatory bargaining subject. That is, (1) the case involved ''the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer,'' and thus, prima facie, is not ''a basic change in the nature of the employer's operation''; (2) the employer failed to rebut this evidence or to probe that labor costs were not a factor; and (3) there was no showing that the Union could not have offered labor cost concessions that could have changed the decision to subcontract.

[5] My colleagues seek to separate these matters from the decision to replace the unit employees. In my view, a determination of whether a particular decision is a mandatory subject should take into account the larger context in which the decision is made.

[6] My colleagues ''have noted'' that the Respondent's decision was ''a reasonable topic for bargaining.'' However, they fail to make ''amenability to bargaining'' an essential part of the test. In my view, amenability to bargaining derives from that part of *FNM* which weighs the potential benefits of bargaining, and the ''labor cost'' portion of the *Dubuque* test is a way of measuring amenability to bargaining. That is, to the extent that a decision is motivated by labor costs, that decision is amenable to bargaining. And, to the extent that the decision is amenable to bargaining, there is a benefit to be derived in subjecting it to the bargaining process.

Based on the above, I would apply *Dubuque* here and I now proceed to do so. In the present case, the General Counsel has presented sufficient proof, which the Respondent has failed to rebut, that the decisions of the Respondent, which resulted in the replacement of unit employees Marshall and Blair by a nonunit employee and by independent contractors, did not involve any basic change in the nature of the Respondent's operation. The Respondent merely used different workers to haul the same raw materials to the same ready-mix concrete facility in Oneida. Furthermore, the Respondent has not shown that labor costs were not a factor in its challenged decisions. The need to transfer Marshall's truck to another facility, the failure to secure an overload hauling permit for Blair's truck, and nonunit employee Haywood's receipt of living expenses and a higher rate of pay do not prove that labor costs were not *a* factor.[7] This is particularly so with respect to the decision to use independent contractors to perform at least some of the work previously performed by the laid-off unit employees. Finally, Respondent had not establishd that the Union could not have offered labor cost concessions that could have changed the decisions involved here. In sum, I disagree with the majority's analysis of the Respondent's obligation to bargain about its decisions here, although I concur in the conclusion that the Respondent's failure to bargain violated Section 8(a)(5).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of our employees in the following unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time drivers, mechanics and yardmen employed by the Employer at its Oneida, New York facility, excluding all office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT lay off unit employees; transfer the work of hauling cement, sand, and stone previously performed by employees employed at our Oneida, New York facility, who are in the bargaining unit described above and represented by the Union to other employees who are not in the unit and not represented by the Union; subcontract out such work, or change any other terms or conditions of employment of employees in the above-described unit without first notifying the Union and affording it an opportunity to bargain about such change.

WE WILL NOT bargain to impasse and refuse to meet and negotiate with the Union unless the Union agrees to joint selection of its job steward and our right to remove the steward after 1 year on 30 days' notice to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the unit set forth above.

WE WILL cancel, withdraw, and rescind the layoff of unit employees and the transfer of the work of hauling cement, sand, and stone previously performed by employees employed at our Oneida, New York facility who are represented by the Union to other employees who are not so represented and notify and on request bargain with the Union with respect to the subcontracting out of any such work.

WE WILL offer to employees William Marshall and Alton Blair, if we have not already done so, immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones without prejudice to their seniority or other rights and privileges.

WE WILL make whole William Marshall and Alton Blair for any loss of earnings suffered as a result of their unlawful layoffs, with interest.

MID-STATE READY MIX, A DIVISION OF TORRINGTON INDUSTRIES, INC.

Alfred M. Norek, Esq., for the General Counsel.
Robert H. Basso, Esq. (Bryant, O'Dell & Basso), of Syracuse, New York, for the Respondent.
Frederick W. Murad, Esq. (Murad & Murad), of Utica, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. The hearing in this case was held on January 9, 1989, on a complaint and notice of hearing which issued on September 21, 1988. The complaint alleges that Mid-State Ready Mix, A Division of Torrington Industries, Inc. (Respondent or Mid-State), by

[7] Contrary to the Respondent, the May breakdown of a cement blower seems to have been no factor at all in the subsequent challenged decisions. Unit employees Marshall and Blair continued to work for at least a month after this breakdown.

laying off two employees and subcontracting certain unit work without prior notice or an opportunity to bargain about these acts or their effects being provided to the Charging Union as exclusive representative of Respondent's employees in the appropriate unit, and, further, by bargaining to impasse and refusing to meet and negotiate with the Union unless the Union agreed to joint selection of the Union's job steward and its right to remove the steward on notice, committed violations of Section 8(a)(1) and (5) of the Act. By answer dated October 3, 1988, Respondent denied the conclusionary allegations of the complaint and interposed certain affirmative defenses, among them that the transaction at issue was entrepreneurial in nature not subject to the bargaining obligation, that it was consistent with the past practices of the Respondent, that the Union waived its right, if any, to bargain over the transaction, and that Respondent has at all times been ready and willing to bargain over the effects of the transaction. Following close of hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record in this proceeding, including consideration of the briefs filed on behalf of the parties, and after close observation of the witnesses and their demeanor while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a Connecticut corporation engaged in the production and sale of ready-mix concrete with its principal office and place of business located in Glens Falls, New York, and a place of business located at 306 East Walnut Street in Oneida, New York (the Oneida facility). During the 12-month period preceding issuance of the complaint, Respondent derived gross revenues in excess of $50,000, of which an amount in excess of $50,000 was derived from sales directly outside the State of New York. The complaint alleges, Respondent admits, and I find that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer admits, and I find that Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL–CIO (Local 182 or Union), and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Status as Exclusive Bargaining Representative*

Following a secret ballot election conducted on July 8, 1988,[1] under the supervision of the Regional Director for Region 3 of the National Labor Relations Board in Case 3–RC–9248, in which the Union secured a majority of the votes, the Union was certified on July 18, 1988, as the exclusive collective-bargaining representative of Respondent's employees in a unit of all full-time and regular part-time drivers, mechanics, and yardmen employed at its Oneida, New York facility. The unit comprised approximately 10 employees. The complaint alleges, Respondent admits, and I find that these employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[1] All dates herein are in 1988 unless otherwise indicated.

B. *The Positions of the Parties on the Article Relating to Job Steward*

The first bargaining session was held on July 15, 1988, at the Union's offices. Appearing for Respondent were Theodore Zoli, president, Joseph Dubey, vice president, and Bill Ward, area manager of Respondent's ready-mix plants. Present for the Union were Frank Parks, Local 182 vice president and longstanding business agent, and Doug Wilson, another Local 182 business agent. At this and all succeeding sessions, Zoli and Parks were the chief spokesmen for their respective sides. The following recital is based on Parks' uncontroverted testimony. Each party presented the other with a set of bargaining proposals. The Union's was the areawide ready-mix contract which it then had in effect with other companies. The particular contract tendered was one running from March 1, 1985, for 3 years with N. D. Peters Co., Inc., a local ready-mix employer. Article III *seniority* provided, inter alia, in subparagraph 1, ''The principle of seniority shall prevail at all times,'' and in subparagraph 2, ''Any employee granted a leave of absence shall retain his seniority rating providing he does not work at the craft. Layoff due to seasonable reasons shall not terminate the employees' seniority,'' and in subparagraph 6, ''Seniority roster shall be posted as of May 1st annually.'' Article IV, subparagraph 5, provided for the Local's appointment of a steward whose duties shall not conflict with his duties to the Employer. The subparagraph also provided for the Employer to take up the matter with local officers before discharging the steward and for a duty of every foreman to cooperate with the steward on enforcing union as well as company rules. Article V, grievance and arbitration procedures, provides, in section 2 that ''Any Shop Steward shall be permitted to leave his or her work to investigate and adjust the grievance of any employee within his jurisdiction, after notification to his Supervisor. Employees shall have the Shop Steward or a representative of the Union present during the discussion of any grievance with representative of the company.''

Mid-State presented a proposed agreement, which, at article 2, provided as follows:

> Article 2: Job Stewards
> 2.1: Stewards shall be mutually agreed upon by the Employer and the Union, and shall serve for a period of not less than one (1) year. After one (1) year, either the Employer or the Union can cause the removal of the steward within 30 days after serving a written notice on the other party of the desire to have a new steward appointed.

Each side agreed to review the other's proposal and to meet again on July 26. On July 26 again at the Union's offices, the parties reviewed the proposals. Parks agreed to work from Mid-State's submission. When they come to article 2, Parks and the Union couldn't agree to that language. He added that he felt the language was illegal. Zoli disagreed. Each agreed to check with their attorneys before the next meeting. During the meeting, which lasted about an hour, Zoli stated he was dead set against the Union's senior-

ity clause. Although there is no indication that Zoli at this meeting referred specifically to a so-called management-rights provision contained in Respondent's submission, my attention has since been drawn to paragraph 1.4 of article I: Union Security which provided that ''The Union recognizes that the responsibility of management of the working forces, including the right to hire, transfer, lay-off, discipline or discharge, and the maintaining of order and efficiency is vested exclusively in the employer.''

At the third session, held on August 3, also at the Union's offices, Zoli first stated he had made a few changes in the agreement, mentioning one in which he had agreed to the Union's proposal regarding protection to be accorded employees who honor a picket line. Zoli then said, ''I've got a real hang-up on this steward language and seniority clause in the contract and either we have to agree with that or we have nothing else to talk about.'' Parks replied he could not agree that the Company had a mutual right to pick or discharge the Union's steward and agreed they had nothing else to talk about. Zoli rose to leave, stating that ''[I]t's in your ballpark now, do whatever you want to do.'' The meeting had lasted about 10 minutes. No further meeting was discussed or scheduled. On direct examination, Zoli was not asked and so did not respond to the statement attributed to him by Parks insisting on the Respondent's steward language as the price of continued negotiations. Zoli's unsure recollection was that by the August 3 meeting he had learned that the steward language the Respondent had proposed ''was not a good framing of that kind of language and there was some conversation between counsel and us.'' (Tr. 121.) During his cross-examination, Zoli confirmed the language was withdrawn at a later date. See infra at 5.

By letter dated August 18, addressed to Zoli, Frederick W. Murad, the Union's counsel, stated, inter alia, ''that the Union stands ready to return to the bargaining table in order to negotiate the terms of a collective bargaining agreement including seniority rights. However, the issue as to the selection of union stewards is an intra-union matter outside the scope of collective bargaining.'' Robert H. Bosso, counsel for Respondent, in a responsive letter to Murad, dated September 13, made no reference to the Respondent's demand for joint authority to appoint or remove the union steward or the Union's rejection of it. By letter dated September 14, Murad again sought to get the parties back to the table, advising he was asking a union representative to contact Zoli, and repeated his prior position that the Union will not negotiate over the naming of a steward. In a letter dated October 5, addressed to the Regional Director for Region 3, copies to Union Counsel Murad and Zoli, Bosso acknowledged that the subject of the Employer's right to select the union steward is a permissive subject of bargaining and noticed that the letter was to serve as the Employer's unilateral and voluntary withdrawal of any and all proposals concerning the matter of the Union's steward. In his testimony, on cross-examination, Zoli finally acknowledged that the steward's language in Respondent's proposed article II was not withdrawn until after the exchange of letters between counsel and ''probably'' took place after the August 3 session. (Tr. 122.)

Following the exchange of letters, the parties resumed negotiations on October 18 at which time Mid-State withdrew its steward's proposal at the bargaining table.

C. *The Facts Relating to the July Layoffs and Alleged Subcontracting of Unit Work*

William Marshall was first employed by Respondent's predecessor in April 1986 as a yardman, and then as a dump truck driver and driver of a ready-mix concrete mixer truck. After Respondent's purchase of the Oneida facility effective January 29, 1988, Marshall subsequently became employed by Respondent. For a 2-month period prior to July 11, Marshall drove a 10-wheel dump truck for Mid-State hauling mainly sand, but also some stone, to the Oneida facility.

On July 11, before fueling up for his last trip of the day, Marshall was called into the office to see Plant Manager Mark McCraith. McCraith told him the truck was needed up north and that he was going on layoff. Later that day Marshall saw the truck being driven out of the yard after he removed his tools. Marshall, although burdened by an arthritic condition of his hands, was able to operate the dump truck and had driven and handled a concrete mixer for 2 years prior to Respondent's purchase of the facility. At the time of his layoff, Respondent had six or seven ready-mix vehicles at the Oneida facility with all but one usually in use.

Alton Blair had been employed by Respondent's predecessor, Mid-State Ready Mix, since 1974, driving a tractor-trailer, concrete mixer dump truck, and running the yard. He had been one of the prior employees hired by Respondent from the outset of its operations in Oneida. In the summer of 1988, for 5 or 6 days a week, he had been driving a Mack tractor with Summit Trailer hauling mostly stone and some sand into the Onedia facility. On Marshall's layoff on July 11, Blair was assigned all the hauling of stone and sand into the plant, working an average 10 to 15 more hours per week. On or about Monday, July 25, Blair was joined in the work by Benny Haywood, a driver employed by Torrington Industries, Inc., who resided in Keesville, New York, 5 hours driving distance north of Oneida. Haywood drove down an International make tractor-trailer owned by Torrington and began hauling sand while Blair continued hauling stone. Blair had not seen this particular tractor-trailer previously at the Oneida facility.

Late in the day on July 26, Blair testified he was called into the office and McCraith told him that they were parking the truck. McCraith responded to Blair's exclamation of surprise by stating ''do you think it's profitable driving a tractor-trailer up and down the road for 15 tons?'' Blair replied, ''we've been doing it for five months. So now we're parking the truck.'' McCraith told Blair he could go on a mixer, what his old job used to be, or go on layoff. Blair asked how long it was going to take to get an overload permit for the Mack tractor, the problem which was limiting the Respondent's use of the truck's maximum hauling weight. McCraith replied they didn't know. When Blair suggested he be allowed to take off a couple of weeks, McCraith said, ''no, he had to know Blair's decision by the following day.''

Blair came in the next day, Wednesday, July 27, and told McCraith he changed his mind and wanted a mixer. McCraith asked him the concrete mixing truck number and Blair gave him the number of his old truck. McGraith told him he couldn't have that one because another guy was driving it and he didn't know when it was available. Then Blair asked him how long before he gets a truck. McCraith said that he didn't know. Blair testified that there were no other ready-mix trucks available for him to drive at that time.

McGraith then said, ''in the meantime, we can't have any problems with phone calls from customers that you didn't back right or mix right or gave them a hard time.'' Blair told McCraith if he thought it was going to be a problem, give him his layoff. Blair was given a layoff slip and asked that when you get the permit back, could he come back. McGraith said that he would have his job back when they got his tractor-trailer back. Zoli since confirmed this in conversation with Blair, informing Blair he'd have a tractor-trailer in the spring one way or another. Respondent failed to adduce any evidence relating to any shortcomings of Blair as a driver of ready-mix cement and Blair denied any problems arising during his 14 years delivering mix. During that period, Blair recalled he had only been laid off once, years ago, by Respondent's predecessor. Usually, he and the owner, Skinner, worked together through the winter, the slow season in the industry.

By letter dated September 8, Zoli informed Blair that the state would not issue the appropriate permit for the Mack tractor and ''the only work we have for you would be operating a ready mix concrete truck as you did from time to tim previously at Mid-State . . . .'' Zoli hoped to acquire a tractor with a permit in the spring and offer Blair a job operating it. Later after receiving the letter, Blair went in and asked what was wrong. They were letting everyone else back in and why couldn't he go back on the tractor-trailer. Apparently, by this time, Marshall had been recalled. McCraith told him there would be no changes made in what they were doing. McCraith did not say anything about Blair driving a ready-mix truck.

Haywood, who continued hauling sand and stone after Blair's layoff with the International rig, received a higher rate of pay than Oneida's drivers, was compensated by Torrington for his weekly stays at a local hotel while working at the Oneida facility, and commuted the 5-hour distance to and from his home at Keesville on weekends, also at Torrington's expense.

At some point after Haywood started hauling sand and stone alone on July 27, he could not bring in sufficient stockpile to fill ready-mix orders from customers and Respondent then made arrangements with a number of outside contractors to haul materials in their own trucks, among them Charles Staught, Frances Fawley, and Atlas Oil.

Marshall was recalled to the Oneida facility on November 14, replacing Haywood in the tractor-trailer brought from Keesville and has continued hauling sand and stone into the facility.

At no time prior to the summer of 1988 had outside contractors been utilized to haul sand and stone to the Oneida facility.

Parks testified that at no time prior to the layoffs of Marshall and Blair did the Respondent contact the Union concerning their possible layoffs or terminations or offer to bargain over the decisions involving these two unit employees or the affect of its actions regarding them. Zoli acknowledged that he never informed the Union at any of the bargaining sessions after Haywood started hauling sand and stone that Respondent had brought Haywood and the International rig down to do this unit work. Neither did Zoli discuss subcontracting of any kind with the Union at the bargaining sessions.

After learning about their layoffs from calls the two employees had placed with his office, Parks brought up these actions at the negotiating sessions but was met by the response from Zoli that he had a right to let whoever he wanted go and to hire whoever he wanted to get himself the most efficient work force and that it was his prerogative to do so. Parks learned from Zoli that the 10-wheel tandem dump truck was needed at another location and that the tractor-trailer was taken off the runs, because it did not have a permit to haul over a certain amount.

Parks recalled that at the July 26 meeting the Union had discussed its proposal regarding seniority, see above, but that the Respondent wouldn't hear anything about it. The Employer then left this meeting and laid off Blair, the most senior employee. At the August 3 session, when Parks raised the matter of Blair's layoff, Zoli told him about the tractor lacking an overload permit, so he brought another truck and driver on. Parks then testified, ''If he brought another truck, we would have been able to discuss it [Blair's retention], but no, he brought another driver and laid our guy off.'' (Tr. 38.)

Zoli testified about a problem which developed with a cement blower which Respondent had inherited from the predecessor owner of the Oneida facility. As a result of the blower becoming inoperative in May, Mid-State became fully dependent on suppliers for delivery of cement powder which had previously been hauled, in part, by its own drivers. Blair had hauled the cement tanker with the Mack tractor when the blower had been used to remove the powder for storage at the facility in a silo.

Zoli also related that Parks had called him on Friday, July 29 complaining that Respondent had laid off one of his people. Zoli testified he told Parks, ''Frank, we didn't lay off one of your people. We offered him a job on the Ready-Mix truck and he refused it.'' Parks told him, ''that's not my understanding.'' Zoli ended by saying, ''He can report Monday if he wants to drive a Ready-Mix truck.'' Blair did not report.

McCraith testified that after giving Blair 1 day to decide whether to go on a mixer or take a layoff, Blair came in the next day and decided to take the layoff. McCraith could not recall any discussion with Blair about which ready-mix truck he would drive but affirmed that a ready-mix truck could have been made available to him if he had wanted one. McGraith said that Blair did not ask for a ready-mix truck then or later when he came to complain after Marshall was driving the tractor-trailer.

On cross-examination, McCraith acknowledged that a trainee was operating Blair's old ready-mixer on a part-time basis and the trainee was later hired full time. Further, when asked if there was a specific discussion about a particular truck, McCraith noted that if there was another truck available, Blair was welcome to it but he did not indicate in so many words whether there was another truck available. McCraith also indicated that Blair had been bothered by his own insistence that he did not want any major complaints from customers.

In the conflict as to Blair's conversation with McCraith on July 27, Blair is credited that he opted to drive a ready-mix truck but none was made available to him. The circumstances surrounding this conversation make evident the Respondent's reluctance to offer a ready-mix delivery job to Blair, that no unmanned truck was then made available for

his use and by dwelling on issues involving customer relations without evidence of any prior short comings on his part, Blair was made to feel uncomfortable in continuing to seek such a placement. Given this resolution, Zoli is not credited as to his version of the Blair, McCraith interchange which he reported to Parks on December 29, and Zoli's offer made to Blair through Parks suffers from the same defects inherent in McCraith's response to Blair on July 27. Parks recalled calling Zoli on the July 29 in regard to bringing in another truck and driver—probably Haywood—to perform Blair's work and did not recall but Zoli could have told him to get ahold of Blair to put him on the ready-mix truck. Parks noted here that the Union's claim was that Respondent had taken Blair off the job covered under the unit and gave it to an outside carrier, and the Union wanted Blair back on the job.

Zoli also testified that it was routine to switch equipment among Torrington's multiple facilities as needed. Zoli later clarified that a nucleus of equipment is maintained at each location but that changes are made between them from week to week and month to month. Besides the facility at Oneida, Torrington has nine other ready-mix concrete plants, mostly in northeastern New York, and five sand and stone processing plants. It has been the Company's practice in the past to maintain a separate payroll for such employees as Benny Haywood who are assigned to different facilities on an as needed basis.

Analysis and Conclusions

I turn first to the issue concerning Respondent's participation in the selection and removal of the Union's steward. In uncontroverted testimony, at the bargaining session held on August 3, Respondent's president, Theodore Zoli stated, in so many words, that unless the Union agreed with Mid-State's proposal on job stewards and withdrew its seniority provision, there was nothing further to talk about at the table, when Union Business Agent Frank Parks protested the Company's intended role in selecting or removing the union steward.

Zoli cut short the meeting with the statement that the matter was now up to the Union to do whatever it wanted, strongly implying that any further negotiations were dependent on the Union's acquiescence to the Respondent's position on the two issues.

By conditioning further bargaining on union assent to joint selection, with the Employer, of the job steward and to the Employer's right of removal of the steward after 1 year, Respondent interjected itself forcefully into a subject—the selection of the agents of its employees' collective-bargaining representative—which the Act enjoins is strictly an internal union matter. See *Howland Hook Marine Terminal Corp.*, 263 NLRB 453, 454 (1982). In accord: *Native Textiles*, 246 NLRB 228 (1979), where the Board at 229 commented, ''The right of employees to designate and to be represented by representatives of their own choosing is a basic statutory policy set forth in Section 7 of the Act and a fundamental right guaranteed employees by Section 7 of the Act.''

The Board has clearly recognized that while certain aspects of proposals concerning grievances are mandatory subjects of bargaining, e.g., whether employees will be paid for time spent on grievance negotiations, the determination of the identity of a party's bargaining representative is a nonmandatory subject of bargaining, and, as such, may not be insisted on, to impasse in bargaining. *Missouri Portland Cement Co.*, 284 NLRB 432, 434 fn. 13 (1988); *Idaho Statesman*, 281 NLRB 272, 275 (1986); *NLRB v. Borg-Warner Corp.*, 599 F.2d 92, 94 (5th Cir. 1979).

Respondent's error was in coupling the selection of steward with its opposition to the Union's seniority provision, a mandatory subject, in taking its adamant position. This error is compounded in its brief where Respondent argues at page 13 that because the Union's proposal clearly had costs attached to it (payment for time devoted to union business),[2] the Employer could lawfully link its willingness to negotiate on this voluntary [permissive] subject with its position on a mandatory subject which also has a cost impact (i.e., seniority or wages), as a package of conditions. The teaching of *Missouri Portland Cement Co.* supra, is directly to the contrary, on the very subject matter—the determination of the identity of the Union's representative—which the Respondent here insisted on including in any resulting agreement. Neither of the two cases Respondent cites supports its erroneous proposition. Neither *Nordstrom, Inc.*, 279 NLRB 601 (1977), nor *Good GMC, Inc.*, 267 NLRB 583, 584 (1983), dealt with the issue as to whether a party's insistence on acceptance of its package including both mandatory and permissive subjects constitutes a refusal to bargain in good faith, the issue here, but rather both dealt with whether a party may be compelled to execute an agreement where the other party has agreed only to the mandatory subjects encompassed in the first party's offer.

Inasmuch as Respondent's insistence on the contract's inclusion of its steward proposal continued, by its admission, from August 3 until well into October, when the parties next resumed bargaining, I conclude that Respondent's demand, as a condition of agreement on terms of a collective-bargaining agreement, that it jointly select the union steward and retain rights of removal of the steward violated its obligation to bargain in good faith under Section 8(a)(1) and (5) of the Act.

As to the Respondent's alleged conduct in laying off two unit employees and subcontracting unit work, it is clear from the record that both Marshall and Blair were laid off during July, without advance notice or opportunity to the Union to bargain about the decisions or their effects, and, further, that Respondent assigned unit work to nonunit employees and contracted out unit work to third parties also without prior notice or opportunity to bargain about these decisions or their impact on unit employees having been provided to the Union.

Marshall's layoff, on July 11, took place after the Union's winning of the election and before its certification. This fact is no impediment to concluding that his removal from the payroll constitutes a refusal to bargain with the duly designated representative of the employees, who, on July 8, chose the Union to represent them, *Bay Diner*, 250 NLRB 187 fn. 2 (1980); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

[2] Although not directly proposed, it may be reasonably inferred that the Union's grievance and arbitration provision, to the extent it authorizes the steward to investigate and adjust grievances away from his workplace, authorizes continued payment of wages during the time necessary to conduct these activities.

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally institutes a material change in the terms and conditions of employment which is a mandatory subject of collective bargaining, regardless of the nature of its motivation. *Office Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986); *NLRB v. Katz*, 369 U.S. 736, 747 (1962). It is clear that layoffs of unit employees are subjects of mandatory bargaining and require the employer to notify the designated bargaining agent and offer to bargain prior to implementing the layoff. *Pent Mfg. Co.*, 261 NLRB 240 fn. 2 (1982). On reaching its decision to layoff ''the employer must notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.'' *Clements Wire & Mfg. Co.*, 257 NLRB 1058, 1059 (1981). Respondents expressed willingness to bargain over the effects of its decision after the fact of the layoffs, recited in its brief at page 20, does not satisfy its duty owed prior to the decision's implementations.

Here, the Respondent coupled its layoffs with its removal of vehicles to another location outside the bargaining unit, coupled in one instance with its reassignment of the work to another employee brought in from outside the unit from another location and its later use of other outside employees and subcontractors to perform the work. Respondent claims that the decisions necessarily implicated in the employee layoffs of reassigning vehicles and outside drivers lie at the ''core of entrepreneurial control'' as discussed in *Otis Elevator Co.*, 269 NLRB 891 (1984) and *Fibreboard Products Corp.*, 379 U.S. 203, 225 (1964), and were consistent with its past practices and thus not subject to bargaining. Neither argument provides a valid defense to the conduct alleged as violative of the Act.

Although it is true that ''where a decision turns on a change in the scope, nature or direction of a significant facet of the enterprise, the Act does not impose an obligation to bargain.'' *Morco Industries*, 279 NLRB 762 (1986), the determination as to whether bargaining is required turns on ''the substance of the decision itself and its amenability to resolution through collective bargaining'' *Collateral Control Corp.*, 288 NLRB 308 (1988), not the name by which it is characterized.

The evidence that Respondent has regularly transferred vehicles and drivers and utilized outside firms to supply its raw material needs as the situation warrants it, aids in establishing that the layoffs and reassignment of driving work to employers and firms outside the unit were a routine part of the business not constituting a significant change in its direction. As the same work continued to be performed by other employers and firms delivering to the same facility at which the bargaining unit members remain employed, Respondent's decisions were, and continued to be, subject to the bargaining obligation. *Pertic Computer Corp.*, 284 NLRB 810 (1987).

Respondent makes much of its discontinuance of the cement blower. That decision, by itself, did not dictate Blair's layoff, the reassignment of his tractor-trailer did, and although Mid-State no longer transported cement powder in its own truck, it continued to use the same products, stone, sand, water, and cement, and to engage in the same manufacturing process and technology of mixing the product to form concrete and delivering it to customers in its own ready-mix trucks. Under these circumstances, its layoff of employees and its reassignment of work from employees represented by the Union to unrepresented employees and outside firms without affording notice of an opportunity to bargain to the Union constitute violations of the bargaining obligation within the meaning of Section 8(a)(1) and (5) of the Act. *Technicolor Government Services*, 271 NLRB 1220, 1224 (1984); *Collateral Control Corp.*, supra. Neither has Respondent shown that bargaining to impasse or agreement over the decisions it made would have jeopardized its business in any way. *Pertic Computer Corp.*, supra. From all that appears, including the credited testimony of Frank Parks, Zoli did not believe that Mid-State owed any duty to consult the Union or negotiate about these matters. I also conclude that inasmuch as the decisions Respondent made here did not change the scope or direction of the enterprise and were amenable to bargaining, my conclusion that bargaining was mandated is not inconsistent with either *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), or *Otis Elevator Co.*, 269 NLRB 891 (1984).

In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), which decision was reaffirmed and explained in *First National Maintenance Corp.*, involving facts very similar to those present here of ''the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . .'' the Court held that such ''contracting out'' or ''subcontracting'' is a mandatory subject of bargaining. Id. at 215. Justice Steward's concurring opinion, on which Respondent relies at page 18–19 of its brief, notes that ''all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer.'' Id. at 224. While the subcontractor here did not work at the facility, they delivered materials to it under arrangements and schedules set by Respondent. As the Board found in *Collateral Control Corp.*, supra at 2, nothing in the opinions expressed by Board members in *Otis Elevator Co.*, supra, should disturb the principles of the Supreme Court's decision in *Fibreboard*. Thus, Respondent's decision to transfer the unit work to other employees, and to subcontract the unit work and to layoff employees and the effects of those decisions, were and continue to be, violations of the Act.

Finally, as there was no history of prior subcontracting or layoffs of unit employees at the Oneida facility, Respondent's practices at its other locations are unavailable to it as a defense for its actions in the unit limited to the Oneida facility in which the Charging Union was selected and certified as the affected employees' bargaining representative.

CONCLUSIONS OF LAW

1. The Respondent, Mid-State Ready Mix, a Division of Torrington Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, mechanics and yardmen employed by Respondent at its Oneida, New York facility; excluding all office employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

4. At all times material since July 8, 1988, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

5. By unilaterally laying off unit employees William Marshall and Alton Blair and by transferring the work of hauling cement, sand, and stone previously performed by employees employed at the Oneida, New York facility who are represented by Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL–CIO, to other employees who are not so represented and by subcontracting out such work without notification to on affording the Union an opportunity to bargain, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2 (6) and (7) of the Act.

6. By bargaining to an impasse and refusing to meet and negotiate with the Union unless the Union agreed to joint selection of the Union's job steward and Respondent's right to remove the steward after 1 year on 30 days' notice to the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including the posting of the customary notice, designed to effectuate the policies of the Act.

Having found that Respondent has unlawfully made unilateral changes in the employees' terms and conditions of employment, I shall recommend that Respondent be ordered to restore the status quo ante by assigning all work of hauling cement, sand, and stone to employees employed at its Oneida, New York facility, and that Respondent be ordered to cease and desist from implementing unilateral changes in terms and conditions of employment of unit employees without first bargaining with the Union which represents them. I shall further recommend that Respondent be ordered to make William Marshall and Alton Blair whole for any loss of earnings or benefits they may have suffered as a result of their unlawful layoffs,[3] less interim earnings, if any, with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

[3] As noted earlier, the record discloses that Marshall was recalled to employment as a tractor-trailer driver on November 14, 1988, and Alton Blair had not been recalled to work as either a ready-mix or tractor-trailer driver by the close of hearing.

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Mid-State Ready Mix, a Division of Torrington Industries, Inc., Oneida, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of its employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time drivers, mechanics and yardmen employed by Respondent at its Oneida, New York facility; excluding all office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) Laying off unit employees, transferring the work of hauling cement, sand, and stone previously performed by employees employed at the Oneida, New York facility who are represented by the Union to other employees who are not so represented, subcontracting out such work, or changing any other terms or conditions of employment of employees in the above-described unit without first notifying the Union and affording it an opportunity to bargain about such changes.

(c) Bargaining to impasse and refusing to meet and negotiate with the Union unless the Union agrees to joint selection of its job steward and Respondent's right to remove the steward after 1 year on 30 days' notice to the Union.

(d) In any like or related manner interfering with, restraining, or coercing any employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request bargain collectively with the Union with respect to the wages, hours, and other terms and conditions of employment of the employees in the unit described above.

(b) Cancel, withdraw, and rescind the transfer of any unit work of hauling cement, sand, and stone to employees not represented by the Union in the unit described above and the subcontracting out of any such work.

(c) Offer to employees William Marshall and Alton Blair, if it has not already done so, immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(d) Make whole William Marshall and Alton Blair for any loss of earnings or benefits they may have suffered as a result of their unlawful layoffs in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records,

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Oneida, New York facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places in both plants including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''